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Requisition of Private Neutral
Property in time of War

REQUISITION OF PRIVATE NEUTRAL PROPERTY
IN TIME OF WAR

BY

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Chapter I

Introduction: Origin of the Right of Angary

In a famous passage in the "Social Contract," Rousseau wrote: "War is not a relation of man to man, but state to state, in which individuals are enemies only accidentally, not as men nor even as citizens, but as soldiers, not as members of their country but as its defenders."¹ It is on this basic idea that the modern law of war rests. Yet it is easy to point out the crudeness and certain confusion of mind which this passage shows. For a state consists only of individual citizens and when one state attacks another, the individuals of the one must attack the individuals of the other. It is impossible actually to realize this ideal. The armies cannot fight except upon the soil and property of the state; even privately owned lands must become the scene of war operations. Moreover, it is not unnatural for a belligerent to endeavor to provide for the objects which he needs urgently for waging war or for maintaining his troops, but which he has not on hand, in the locality where he is just then stationed. Such action is recognized by the Hague Conferences to the effect that in enemy territory the belligerent may, through requisitions procure from private individuals those objects which he needs for his army.

Such requisitions affect especially the nationals of the enemy state. It may be questioned whether they affect also the nationals of neutral states. According to the general principle of international law, neutrals may not be treated as enemies in the course of war. This being true, it might be asserted that even private neutral property could not be subject to requisitions for the

1. Bentwich, War and Private Property, p.11

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reason that the neutrality of the owner would be violated. But it³ is not impossible that a belligerent under military necessity, may resort to the right of requisitioning even private neutral property which is found to be accidentally in its own territory or in the territory of the enemy. This is known as the right of angary which is traceable even to early Roman times, though, for a time, it came to change its original meaning.

As regards the right of requisitioning private neutral property distinction must be made between property continuously or temporarily situated in the territory of a belligerent itself or in occupied enemy territory. What rules govern these two cases? And what rules govern the requisitioning of private neutral ships in territorial waters or on the open sea? If "military necessity" is maintained on the part of the belligerent, what would be the scope of the term, and what would be his liability in exercising the right? It is the object of this study to ascertain and set forth whether or not and to what extent the right of angary is justifiable according to the accepted law of nations. Before going any further a sketch of the historical basis for the right of angary throws much light on the right as is understood today.

Origin of The Right of Angary

The development and evolution of ius angariae in international law are connected with certain legal principles that were established in Rome with regard to the right of dealing in grain. According to Roman Law, all owners of ships, in case of necessity, were subject to the obligation to place their ships at the disposal of the public authority to facilitate the importation of grain. It cannot be ascertained from the sources that private ships could be seized for the military transportation service. There was a special organized guild called the Corpus Naviculariorum which attended to

the transportation. The case of necessity, when private ships could also be compelled to perform such service, arose, only when the guild was unable to meet the situation, either for want of ships, or because at a given moment public ships for the transportation of grain were not available. Services accepted from private ships in these circumstances were not called angariae by the Romans. ² Angariae is a low Latin word implying forced service; it comes from the Greek word (taken from Persian) meaning a messenger ³ in ancient Persia liable to impressment in the royal service. In the Corpus Juris, Angariae refer rather to statute labor with teams, compulsory furnishing of teams for the transportation of things and persons in affairs of the state. In the Latin language wagons were also designated by that same term, that is to say, wagons used for the transportation of fiscal goods or accompanying the arms for the accommodation of the sick. And, finally, angariae denoted also draft animals that were provided for such purposes by the owners of land by reason of an easement on such land. From this it appears that angariae in Roman Law did not belong to maritime law, but to that which might be called the law of postal administration. In the Roman Law, we meet, to be sure, with legal principles referring to the performance of transports intended for the supply of the necessities of life, and especially of Rome. Furthermore, these legal principles are not of an international ⁴ nature, but referred merely to domestic affairs. "Angariae" was used in the Middle Ages in reference to certain feudal burdens. We find angariae (to compel) in the Vulgate; and in the Digest it ⁵ means to exact velleinage.

2. Memorandum of Authorities on the Law of Angary, pp. 25-26
3. American Law Review, vol. 52, p. 452
4. Memorandum of Authorities on the Law of Angary, p. 26-29
5. American Law Review, vol. 52, p. 452

After the new parts of the world had been discovered and a lively rivalry had arisen between the Western European States for the possession of colonies, it became especially important for the interested powers to secure ocean-faring ships. These were used for the outfitting of expeditions, for the discovery of new territories or for waging war against competing powers. As international relations became more complex, the right of angary came to be applied to ships. Writers sought to explain the practice of the seizure of ships for the service of a state on the basis of the Roman Law. Such attempts were not of great scientific value; they were full of misconceptions of the principles of Roman Law. But as in all other cases, upon accepting the principles of Roman Law, it was not the purpose to grasp and interpret them in the only way in which they were expected to be grasped and interpreted, but for the needs of the occasion the foreign term had to be adapted to them.

Under the term ius angariae, many writers on international law place the right which was often claimed and practiced in the later period, of a belligerent deficient in vessels to lay an embargo on and to seize neutral merchant men in his harbors, and to compel them and their crews to transport troops, ammunition, and provisions to certain places on payment of freight in advance. This practice was frequently resorted to by Louis XIV of France.⁶

The validity of this practice was clearly recognized both by the civil law and common law. By the civil law, according to the "Black Book of the Admiralty" a King was justified in pressing into service, or seizing ships of every description and of every nation which might be found in his ports, for purposes of urgent necessity but, nevertheless, a tacit condition of safe return was annexed to

6. Oppenheim, International Law, vol. 2, p. 394

such seizure or impressment. By the Ancient Law of England, the Admiral might arrest any ships for the King's service, and after he had made a return of the arrest in chancery, the owner of the ships could not plead against such return.

It is also evident from the ancient writs and patents of England that the Admiral, the Wardens of the Cinque Ports, and others, were authorized to seize ships of war and other vessels, to impress seamen, and to commandeer provisions and arms for purposes of ⁸ national defense. The exercise of the right apparently was not limited to English ships only. By way of partial satisfaction to the neutral, it was customary for the belligerent to pay freight for such ⁹ service in advance. The exercise of this right became so vexatious to neutrals that a series of treaties were drawn up attempting to abolish it. For a time the right seemed to be obsolete. The close of the 18th century witnessed the revival of the right, when Napoleon again called the practice into play. Since then the right has been more commonly applied and adopted by many treaties, and the exercise of this right was no longer based on royal prerogative, but rather on eminent domain or territorial sovereignty. Thus from the view points of its origin, the word angariae pertained to postal administration, and had nothing to do with maritime law, and it gradually ¹⁰ came to apply more and more to ships. However it should be remembered that the term "angariae" is always applied both to requisition on land as well as in territorial waters.

7. Halleck's International Law, v1. p.520

8. Ibid. p.520

9. Oppenheim, International Law v1.2 p.394

10. Am. Jour. Int. Law, v1.13 p.268 (April 1919)

Chapter II

Requisition of Private Property in General.

As regards the requisition of private neutral property, four cases should be examined in accordance with the accepted rules of nations, because in time of war, neutral property may be found either in the territory of the belligerent state or within its territorial waters, such as rivers, harbors, ports and sea; in occupied territory, or on the open sea. The requisition of property in each of these cases meets with different view points, and the historical development of the rules governing them is likewise different. The cases of requisition within the territory of a belligerent state and its territorial waters, as a matter of fact, should be grouped into one, because in both cases territorial jurisdiction is usually and similarly maintained, in case of necessity on the part of the belligerent. But the exercise of the right of angary in territorial waters may involve the question of maritime law and the objects to be requisitioned are different from those requisitioned on land. Therefore the two cases will be treated under different categories. On the other hand, requisition on land naturally falls into two categories: namely, requisition in the territory of the belligerent state and requisition in an occupied enemy territory. Again a distinction should be made in the latter case between military occupation and conquest.

1. Requisition of neutral property in the territory of a belligerent state.

SO far as the Hague Regulations are concerned, the 19th article of the fifth convention recognizes the right of angary in allowing a belligerent to utilize, in case of necessity,

railways belonging to neutrals, subject to the payment of compensation. But the article relating to the so-called right of angary deals only with the use by a belligerent of neutral railway material. As a supplement to this written provision, the following customary rule of international law may be given: "Property of neutrals of other kinds found in territory which is ~~in~~ the scene of hostilities, is liable to be taken possession of or even destroyed for strategic reasons by either belligerent, but compensation must in this case, be made by the belligerent so acting to the neutral owners for the loss they have sustained."¹

No. V

Article 19 of the Hague Convention provides: "Railway property coming from the territory of neutral states whether it belongs to these states or companies or to private persons, and distinguishable as such, cannot be requisitioned or utilized by a belligerent except in such cases and in such manner as dictated by absolute necessity, such property shall be returned to its country of origin as soon as possible."

Similarly, the neutral state can in case of necessity, keep and utilize to an equal extent property coming from the territory of a belligerent state.

An indemnity shall be paid proportionate to the amount of the property utilized and the character of utilization."²

The new provision added to the 19th article of the Hague Regulations is very interesting and important, because it empowers the neutral from whose territory the requisitioned railway plant has come to supply its place for the time with railway plant which has come into its territory from that of the belligerent power

1. Holland, Law and Custom of War on Land, p.9

2. Scott, The Hague Conventions and Declarations of 1899 and 1907, p.137

which authorized the requisition. Up to that time the right of angary was supposed to be exercised only by the belligerent state. And since the existence of this provision, a neutral country, during the great European War, had resorted to this right. The importance of the provision is that it has a double object; first, to prevent a neutral state from having its own railway service disorganized by the loss of its rolling stock; secondly, to provide an automatic discouragement, as it were, to the practice of seizing neutral material which a belligerent might be inclined to resort to if the material so obtained becomes a clear addition to his resources. The provisions set forth by the article constitute a valuable restraint upon unscrupulous belligerents. The seizure by the neutral is not a measure of reprisal; and it must be resorted to impartially and not in such a way as to favor a particular belligerent.³

We shall have to consider the legal status of such neutral property whose owners have no domicile within the territory of the belligerent state, nor reside there in, and therefore, of property which is merely in transit or has momentarily come into the country of the belligerent. There are many treaties of the 19th century which provide that the nationals of one of the contracting parties may be subject to no requisitions within the territory of the other party etc; it is, therefore, presumed that the owners of the foreign state can be reached, that they dwell within the territory of the respective state. But it is nowhere stated that the property of the nationals of one of the contracting parties remains free to this or to that extent from requisitions within the territory of the other party. This latter conception would include all cases in which it would be possible for a state to requisition

neutral property.

According to the law of War, a neutral subject domiciled in an enemy country acquires an enemy character, which extends to his property; and apart from domicile, neutral property may acquire such a character by being locally situated in the enemy's country. Such neutral persons or property are, therefore, subject to all the consequences of lawful hostilities, loss or injury by bombardment, the payment of contributions, and the like. But neutral property only temporarily situated in the enemy country acquires no hostile character, and though the belligerents needs may justify his seizing or making use of it, the neutral is entitled to compensation.⁵

The general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of the state is clear and indisputable; and no objection can be made to its effect upon property which is located either permanently or for a considerable time within the belligerent territory. But it might perhaps have been expected, and it might certainly have been hoped, that its application would not have been extended to neutral property only temporarily within a belligerent state. But the right of angary is not necessarily confined to such property of subjects of neutral state as retains its neutral character from its temporary position on belligerent territory.

We have just been considering the legal status of private neutral property with reference to the right of angary. As to the scope of the right, only the seizure of railway material belonging to neutrals is now regulated by convention. But is the right in question only confined to railway material? In fact all sorts of private neutral property, whether it consists of vessels or other means of transport, or arms, ammunition, provisions or other personal

4. Memorandum of Authorities on The Law of Angary p.15

5. J.S.Risley, The Law of War, p.139

property, may be the object of the right of angary, provided the 11
articles concerned are servicable to military ends and wants. As
to the position of property, so far as it is within territorial
limits, there is no difference in principle, it is submitted, be-
tween the rules which should govern the requisition of instruments
of commerce on land and in port. The two cases are clearly analog-
ous. The 19th article of the Convention is by necessary implication
equally adaptable to transportation by sea. To lay down any other
rule would discriminate against sea powers. It would confer upon a
powerful inland state with excellent railroad communication, an
effective control over neutral means of communication, while simi-
lar powers would be denied to its enemies who were forced to rely
upon naval forces and instrumentalities for purposes of communica-
tion. It would be singular indeed if the right of angary in respect
to ships should be abrogated at the very moment when the correspon-
ing right of requisition of rolling stock on land was receiving
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full recognition.

This question may be asked: Is the exercise of the right of
angary a use of belligerent power, an exercise of a sovereign right
or prerogative, or an application of the principle of eminent domain
or territorial sovereignty? Up to the time of the second Hague Con-
ference in 1907, the idea that a neutral as well as a belligerent
might exercise the right of angary had not been put forward, and
the right exercised was rather based on prerogative. The way in
which it was suggested was by the seizure of some Swiss rolling
stock by the Germans in 1870. The hardship worked upon the Swiss at
that time inspired the delegates at the 1907 Peace Conference to
adopt the 19th article of Convention V in which we find the neutral
given the same right as the belligerent, based on the similar right

6. Oppenheim, International Law, p. 395

7. Minnesota Law Review, vol. 2, p. 421

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of eminent domain. In fact, since the conference of 1907 at The Hague there has been a tendency to regard the right as one based on territorial sovereignty or eminent domain rather than a prerogative of sovereignty.⁸ As Hall puts it, "the true basis of the right of angary, is to be found in the principle of territorial sovereignty. The law of every state is supreme over both persons and property within the local jurisdiction.

2. Requisition of private neutral property within occupied enemy territory.

A careful distinction between occupation and conquest is one of the great improvements in the law of modern warfare. It prevents the premature disturbance of property and legal relations which resulted from the old conception that the invader had conquered the territory as soon as he was in occupation of it. Today conquest does not result until there has been the complete subjugation or extinction of one of the belligerents. A treaty may not always be necessary to perfect the condition. Until this occurs, there is only occupation. A territory is held to be occupied when it is, as a matter of fact, under the authority of the hostile army which has exclusive possession. Seizure in war does not give the belligerent any general right of possession to the property of his enemy, but only a right of use based on the grounds of necessity and self-preservation, and it extends only to things, which are in *de facto* possession. In this way it is radically different from conquest, which does provide a jural right of possession, so that an occupant who becomes a conqueror succeeds to the incorporeal assets of the dispossessed sovereign. Property divested by an occupant in excess of his rights returns to the original owner. so far

8. American Journal International Law, April 1919, p. 284

9. Hall International Law, p. 743

as possible, upon the restoration of the old sovereign power, by the so-called law of postliminium. This is a sort of international equity which considers as not done, what should not have been done.¹⁰

Land war has very serious effects upon the private property of enemies and neutrals which is situated permanently, in the territory of the belligerent. On land the property of neutral is not treated differently from that of enemies nor has the neutral any more legal right to compensation for damage done incidentally, for it is not the character of the owner but the location of the property which is decisive. Even when the property of domiciled neutrals is taken possession of or destroyed for strategic reasons by either belligerent, compensation need not be paid to the owners for the loss they have sustained. But the property of the neutrals temporarily in the country when seized is such circumstances, is entitled to compensation. The injuries, however, caused by the events of war, battle, seizures and bombardments, -these are considered as due to necessity and force (measure), and akin to losses caused by acts of God, storms, earthquakes etc; and neither belligerent considers himself required to compensate the private owners affected. Legally domiciled neutrals have not better legal rights from the conqueror than enemies. For the purposes of war and conquest rights depend, in the main, upon domicile. The domicile of the neutral makes him liable to the same conditions as the hostile subjects and the conqueror will only recognize towards him the same liabilities as he recognizes towards any other inhabitants.¹¹

10. Bentwich, War and Private Property p.40

11. Ibid. p.73

With regard to the requisition of things and services, an invader rarely has much time for drawing distinctions, but if he had the time, he would probably choose to take what he wanted from enemy rather than from neutral subjects, without prejudice to his right to take it from the latter in case of need and without incurring greater liability than he would incur towards the former. There are chances which neutral individuals and companies residing or carrying on business in foreign country must run, for themselves and for all property which they possess in that country in connection with such residence or business, whether the residence amounts to domicile or not. They increase the strength and wealth of that country and to protect them against the consequences of an invasion of it would be an intolerable task for their own governments.

They may, however, be better situated than the conquered subjects as regards their remedy, in as much as any grievance which they urge can be backed up by their own governments, whereas the others must depend only upon the grace of the conqueror. The experience of the Transvaal annexation, indeed, seems to show that special favor may be extended to neutral corporations as regards the contracted rights of simi-public character. It is true that the Transvaal commissions held that the property of the neutral shareholders in the Netherlands South African Railway Co. had been legally forfeited by the unneutral service of the companies' director in the Transvaal. But this was an extreme case of identification with the enemy which could not be excused.

The same reasons do not apply to property which may enter a territory in the course of a business carried on elsewhere, and which in the same course would soon leave it again. Such is the

12. Westlake, International Law vol. 2 p.117

13. Bentwich, War and Private Property, p.73

rolling stock of a foreign state or railway company which cannot avoid crossing and recrossing the frontier from time to time. Even in such case the neutral owner has in some measure entrusted his property to the fortunes of the enemy, though not so far as to identify it with him, and the just course is to allow it to be requisitioned for a real military necessity, with compensation.

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tion.

Articles 52 and 53 of the 4th Convention of 1907 permit a belligerent in military occupied territory to demand requisitions in kind or payment in money, and to take possession of all means of transport or other private property, subject to restoration at the conclusion of peace. Such obligation being imposed on a military occupant of enemy territory in regard to private enemy property. We may regard it, in principle, as applying a fortiori in case of neutral property temporarily or accidentally situated in belligerent territory. If the immunity of private enemy property is recognized, that of private neutral property must be consistently recognized also.

It should be remembered that article 19 of the Hague Regulations indirectly recognizes the right of angary, since it does not prohibit the use of a neutral plan, but only requires it to be sent back as soon as possible. That, eventually indemnities must be paid for it, follows indirectly from the second part of article 53 of the

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Hague Regulations. Article 43 of these Regulations defines the duty of the occupying belligerent, and Article 52 defines the rights and limits of the occupying belligerent. But unfortunately the terms of the latter law do not impose very definite limitations upon the action of the commandeurs. So much depends upon what they consider to be the needs of the army of occupation. And

14. Westlake, International Law vol. 2, p. 118

15. American Law Review, vol. 52, p. 445

16. Oppenheim, International Law, p. 396

Hague law 46 states that private property must be respected. It is difficult to make a proper differentiation between respect for private property and particularly private neutral property, and the necessity of the army; in war it is impossible.

3. Requisition of private neutral property in territorial waters

In territorial waters, the objects that can be requisitioned, are naturally ships. In maritime warfare as well as land warfare ships are useful to either belligerent. For instance, in case of land warfare, the belligerent intends to occupy an island belonging to the enemy state, he must then transport his troops across, or ^{may} ~~he~~ need ships in order to blockade a watercourse by sinking them at its mouth etc. In fact the practice of requisitioning neutral ships in his harbors and compelling them and their crews to transport troops, war material, and provisions to a certain destination on payment of freight by the belligerent, was not uncommon in the past. The validity of this was recognized by the English law as seen in the first chapter, though such practice is not regarded as a legitimate exercise of the right of angary.

The modern view of the right of requisitioning private neutral ships may be best discerned in the United States Naval War Code of 1900, article 6, which provides:

"If military necessity should require it, neutral vessels found within the limits of the belligerent authority may be seized or destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed."
 In the case of U. S. v. Dickelman, the Supreme Court emphatically laid down the rule that ships which voluntarily enter a foreign port thereby place themselves under the laws of that port, whether in time of war, or of peace. In other words, neutral vessels enter

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a belligerent port at their own risk. They cannot claim the privileges of international commerce in time of war, without subjecting themselves to the belligerent rights, and operations of war. Neutral ships and neutral property in belligerent territory enjoy the rights, and must share the liabilities of the ships and property of citizens of the state, save in so far as they are exempted by treaty or by rules of international law.

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In theory and in practice, there has been developed with regard to the requisition of ships, especially of private neutral ships, a special legal institution to which different names have been given. Many writers consider that the case of the Napoleon expedition into Egypt in 1798, which was carried in a fleet largely made up of neutral ships commandeered in French ports for that purpose, was a revival of the right of angary. In fact, they even consider that it is a modern right of angary in contradistinction to the obsolete right to compel neutral ships and their crews to

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render certain service. However, a great deal of confusion has existed, in the minds of many writers on international law, as to the scope and status of this right, especially with regard to requisitions of private neutral ships. For example, Spaight identified the right of angary with prestation. Halleck says it is akin to the right of prestation, embargo, or arrest *de* princes. Phillimore says it is always classified with reprisals and embargo by writers on international law. Phillipson says the terms prestation and angary are now used interchangably.

It thus appears that the only ground for a distinction as made by every few authorities who attempt a distinction at all, is that the very vessels are hired by the belligerent and freight

18. Minnesota Law Review vol. 2 p.423

19. Oppenheim, International Law. vol.2 p.395

paid in advance in case of prestation, which in case of angary, if referred particularly to ships alone, they are appropriated and destroyed, compensation or indemnity being made later. The right of angary is by somewhat related to the right of preemption and to arrest de princes, but no confusion need arise in distinguishing them. Preemption is the belligerent right to requisition neutral cargoes which are conditional contraband, provided a just compensation or purchase price is paid to the owners of the goods. This right is exercised on the high sea. Arrest de Princes is the right of a belligerent to detain neutral vessels which are imports in order that they may not carry news of some military event which would be valuable to the enemy. The loss caused to the owners of the detained vessels is made good by the belligerent which detains them. The embargo has been employed for a still different purpose; that is, to gain possession of neutral vessels found in port on the breaking out of war; to be used for transportation of munitions or troops, or for the other temporary, belligerent purposes. It is difficult to distinguish this from seizure of innocent neutral vessels at any later period of war for the use of the belligerent government.²⁰

I might say that, in general, with the exception of preemption which is exercised on the open sea, all these other terms are closely related to the right of angary which affects any private neutral property temporarily situated within territorial jurisdiction. No matter in what form the private neutral vessels may be requisitioned, the right of angary, in case of application, is maintained on the part of the belligerent, as one based on the theory of eminent domain or territorial jurisdiction. This view is similarly held by many writers. Halleck says "by virtues of the right of angary neutral vessels may be appropriated by a belligerent on payment of a

20. Am. Jour. Int. Law, Vol. 13, pp.280-281, (April 1919)

reasonable price for compensation." It is an act of the state by which foreign as well as domestic vessels which happen to be within the jurisdiction of the state are seized upon and compelled to transport soldiers, ammunition, or other instruments of war. Writing in 1789, De Martens declared that "it is doubtful if the common law of nations gives a belligerent, except in case of extreme necessity the right of seizing neutral vessels lying in its ports at the outbreak of war, in order to meet the requirement of the services. Though we see that the right of requisitioning neutral ships is based on eminent domain, it cannot be said that it may be exercised without being under urgent necessity.

However, the use of neutral vessels brought in for an alleged offense or liable to detention is not exactly similar to that of innocent neutral vessels found in a belligerent's harbors; but the underlying principle of necessity is the same in each case. Moreover, we may refer to the analogy furnished by friendly aliens in belligerent territory. Under the customary rule of international law, though they may not be taken into the belligerent's army for service aboard in the absence of special Conventions with their states authorizing it, they may none the less be compelled to perform police or military service in case of necessity-for example, to repeal a threatened invasion. And if a neutral vessel which attempted to escape from requisition, in time of war, and in case of necessity, it would be liable to confiscation. Thus we have seen that the right of requisitioning private neutral ships in

21. Halleck's International Law, vol 1, p.520

22. Phillimore, International Law, vol 3, p.50

23. Minnesota Law Review, vol 3, p.417

24. American Law Review, vol.52, p.456

25. Taylor, International Public Law, p.702

territorial waters (as some writers maintain that it is a modern right of angary) can be exercised in time of war and in case of necessity if compensation is paid, because the law of every state is supreme over both persons and property within local jurisdiction. If this is true, it is difficult to see why vessels alone should be taken; why not specie also, or cargoes of arms and ammunition, or indeed anything the belligerent is in need of for war-

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like purposes. As a matter of fact the jurisdiction of a belligerent is seldom exercised over neutral goods which are only temporarily within the country. But this limitation is essentially self-imposed; it is a concession which is made to neutral interests on the ground of public policy and convenience. It is a relaxation of the right of the belligerent state rather than an acknowledgement-
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ment of the legal claim of the neutral. Moreover, we should notice that if the right of requisitioning neutral vessels is based on territorial jurisdiction, there is no material difference in principle between the rules which should govern the requisition of instruments of commerce on land and in port. The two cases are clearly analogous. To me the 19th Article of the 5th convention, is by necessary implication equally adapted to transportation by sea, because it would be unfair if the right of requisitioning private neutral ships should be denied when the right of requisitioning rolling stock on land was recognized.

4. Requisition of private neutral property on the open sea.

Martime war, owing to the conditions of space is found to affect the rights of neutrals more than land war, and it was much earlier found necessary to regulate it and to introduce some kind of judicial control over capture. Special courts, the first courts where anything in the nature of international law was administered

26. Lawrence, Principles on International Law, p. 628

27. Minnesota Law Review, vol. 2, p. 423

date from the 13th century. Belligerent rights may be maintained in their stringency longer upon the sea than on land, but they have always been more subject to order on that element. The sea is the highway of commerce of all nations, belligerents and neutrals alike; and before respect for the property of enemies had been established, sovereigns found it was necessary to regulate capture ²⁸ judicially in order not to irritate neutrals. On land, progress was slower because there was less opportunity for the influence of common consent and because the institution of private property was not fully established. The supreme lord's right of eminent domain was widely enforced in war time. The rights of offense balanced the rights of defense and between the two private property had no protection in time of war. As nations became more settled and private war was gradually abolished, the conception of private property became more fixed. From the time of the Peace of Westphalia it may be said that a continually developing series of rules, dependent for their authority on custom and the common consent of nations, has regulated the actions of European states to one another in war as well as in peace. The rules of war on land have not been administered in any court or possessed any other coercive sanction, but none the less they have continuously modified practice in the direction of humanity. The usage of war at sea, on the other hand, during the seventeenth and eighteenth centuries received the form of positive law, as the decisions of Prize Courts of each nation, defining the rights of maritime capture over the property of belligerents and neutrals, were reported and collected. However, the history of war on sea does not show the same progress in the seventeenth and eighteenth centuries, as the history of war on land, nor a corresponding reform in the nineteenth.

28. Bentwich, War and private Property p.5

29. Bentwich, War and Private Property p.5-7

century. The theory of the Great Maritime powers as expressed in treaties was at variance with their practice during war. Despite treaties and profession, all nations habitually confiscated private enemy property at sea whenever they found it. ³⁰ So much for the status of private property on land as well as on the high seas ~~and~~ with reference to the right of capture and seizure.

As regards the requisition of private neutral ships and property on the high seas, no treaties of regulation can be found, though we will find wealth of material in the treaties dealing with the status of the requisition of neutral ships as are within the sovereignty of the belligerent, that is to say within his territorial waters or in the waters of the enemy state. But the principles of the ius angariae were especially intended to be applied on the high seas. In the ancient practice of maritime it happened that the states sent forth their ships on the high seas to seize all vessels they encountered even neutral vessels, in order that they might be equipped for warfare and used for that purpose. It was against this practice that the treaties of the seventeenth and eighteenth centuries (as will be shown later) dealing with the abolition of the ius angariae were directed. But it might be asserted that the prevailing judgement is to the effect that no belligerent may proceed in such unrestrained manner, but so far as the right of requisitioning private neutral ships is concerned, it is restricted to those which are found in his ports or in his ³¹ territorial waters. A ship on the high sea is only subject to the sovereignty of the state whose flag it flies, and accordingly it may not forthwith be used by any other states for use in the conduct of a war. The term "high seas" is used in international law, to fix the limits of the open ocean, upon which all peoples, po-

30. Ibid, p.13-14

31. Memorandum of Authorities on the Law of Angary, p.55

ssess common rights--the great highway of nations.³² Therefore neutral shipping need in no way submit to any directions on the part of the belligerent. But this does not mean that a neutral can do anything that is of advantage to any particular favored belligerent. It is true that international law recognizes cases in which the belligerent may exercise sovereign rights against neutral ships, namely, in case of breach of blockade, or of the transportation of contraband, of unneutral aid, etc. All these regulate the behavior of the neutrals. Under the practice of several maritime states the carriage of goods conditionally contraband was followed by preemption; that is, forced purchase at the cost of the goods plus freight and a reasonable profit. The Declaration of London expressly admits such preemption or requisition subject to the payment of compensation, first, in the case of arts and materials serving exclusively for care of the sick and wounded,³³ and secondly, in the case of contraband found on a vessel encountered at sea making a voyage unaware of hostilities or of contraband declarations affecting her cargo, or if the master, having become aware of these facts, has not yet been able to discharge the contraband.³⁴ And the belligerent can exercise a right of visit and search upon the common and appropriate parts of the sea.³⁵ But in all these cases the interference of the belligerent bears only the mark of a measure of precaution or of a penalty for direct or indirect participation of neutral ships in the hostilities. A legal principle according to which neutral ship might also be subject to re-

32. Moore, International Law Digest, vol.2, p.885

33. Bentwich, Declaration of London, p.78

34. Ibid. p.83

35. Moore, International Law Digest, p.886

quisition on the part of a belligerent would be outside the system of the rules of maritime warfare as they exist with regard to neutrals. Requisition of private neutral property, if admissible at all, on the high seas, would easily enable a warship to continue hostilities longer than it would be possible were it solely dependent upon the supplies which it carries. It might be correct to admit that such requisitions are absolutely forbidden. Mr. Oppenheim holds that the modern right of angary consists in the right of belligerents to make use of or destroy in case of necessity for the purpose of offense and defense, neutral property on their own or enemy territories, or on the open sea. He continues that; If property of subject of neutral states is vested with enemy character, it is not neutral property in the strict sense of the term neutral and all rules respecting appropriation, utilization, and destruction of enemy property obviously apply to it. Certainly in the case of requisitioning neutral property on the open sea, he does not mean that it is other than unneutral service. Yet he seems to be confused in holding that the right of angary also included the requisition of neutral property on the high sea in case of unneutral service or contraband.

If the right of requisitioning private neutral property is considered to be the modern and accepted form of the right of angary, it consists of the right to use or even to destroy private neutral property which is temporarily on his own or on enemy territory subject to the payment of compensation. It applies not only to neutral vessels, railways, and other means of transport, but also to war materials and equipment, provisions, and other articles

necessary for military purposes. It does not apply, however, to such property of neutrals as is liable to seizure or destruction ³⁷ under the law of contraband, unneutral service, and blockade.

37. American Law Review, vol. 52, p. 453

Chapter III

Requisition of Private Neutral Property in accordance with
Treaties

We have seen that private neutral property may be requisitioned either on the territory of a belligerent state or within occupied territory, in territorial waters or on the open sea. In the case of the latter, it can be requisitioned only when it is vested with enemy character by violating the law of contraband, unneutral service, and blockade, and it is not within the sphere of the right of angary. For the requisition of private neutral property on the territory of a belligerent state and in territorial water we find a wealth of material in the treaties, but there is scarcely any contractual law that will meet the ^{other} two cases. In these treaties, regarding requisition on land, we find provisions agreed upon with regard to the extent in which the property of the neutrals of the two contracting parties is subject to military requisitions. Such provisions are generally established for peace and war times. According to their phraseology, it can not always be stated with certainty. In treaties regarding requisition in territorial waters we find also a variety of modes in the matter of compensation. Nevertheless, for the study of our subject, such provisions are of special importance.

1. Treaties regarding requisition in the territory of a belligerent state.

Treaties directed to that purpose, may be found in large numbers. According to the regulations agreed upon they may be divided into three main categories: 1. Treaties in which the contracting states renounce the recourse to requisitions against neutrals of

the other contracting party residing within their territory. 27

This is especially agreed upon in treaties concluded between the
1
German Empire and the central and South American Republics. Article
7 of the treaty with Colombia of July 23, 1892, provides:

The nationals of one contracting party shall, within the
territory of the other party, be free from extraordinary war con-
tributions, compulsory loans. The other agreements are nearly i-
dential with one another, based upon the following type (Article 5
of the treaty with Salvador, June, 13, 1870):

The Salvadoreans in Germany and the Germans in Salvador shall
be free both from all personal military services and from all
extraordinary war contributions, compulsory loans, military re-
quisitions or services of any nature whatever. Further more, they
may in all cases regarding their movable and immovable property
be subjected to no other burdens, taxes, and contributions other
than such as may be required of their own nationals or of the na-
2
tionals of the most favored nation.

In the treaty of commerce and navigation with Spain, July 12,
1883, article 6 reads as follows:

The neutrals of each of the high contracting parties, within
the territory of the other shall be free from all military re-
quisitions and services, however they may be called, and which may
be imposed for military---, but without prejudice to the obligation
to furnish quarters and of other neutral service for the armed
power, in so far as this obligation is imposed upon the inlanders.

The test of article 3 of the treaty of commerce concluded be-
tween the German Empire and Serbia, August, 1892, is of a similar
3
nature. 2. Treaties according to which requisitions are admissi-

1. Memorandum of Authorities on The Law of Angary, p.11

2. Ibid. p.11

3. Ibid. p.12

ble only in case they appear as taxes connected with the possession of landed property. Thus, in the treaty with Mexico of December 5, 1882, Article 14 reads as follows; Furthermore, they (that is to say, the nationals of each of the contracting parties) shall be freed from forced loans as well as from taxes, requisitions and contributions for purposes of a foreign war in so far as these are not imposed upon immovable property within the country, in which latter case they are to be borne by the nationals of the other party exactly in the same way as by the citizens.⁴

Article 4 of the treaty with Rumania of October 21, 1893, excerpts--

Military services and exactions which may be required of all inlanders as owners, lessors or lessees of immovable property.⁵

In other treaties, in which even the mere admissibility of such requisitions is determined, requisitions that affect the respective subjects as owners of immovable property, a clause of most favored nations is still added. In the treaty of the German Empire with Russia of February 10, January 29, 1894, article 3, only the admissibility of billetings and the imposition of special taxes is recognized.⁶ 3. Treaties in which it is agreed that the nationals of the other contracting party are subject to the treaty between Germany and Sweden of May 8, 1916, reads as follows:

They (that is to say, the nationals of the one contracting party who sojourn or have taken up their domicile within the territory of the other party) shall not be subject to any other military services and requisition in peace time and in war time than those to which the inlanders are subject and the nationals of the two parties shall be mutually entitled to damages such as are determined in favor of the inlanders of the two countries according to

the laws therein in force.⁷

In a treaty between the German Empire and Greece of July 9, June 27, 1884, there is also almost favored nation clause (Article 5) which reads as follows:

"The nationals of each of the two high contracting parties shall be freed within the territory of the other party---from all military requisitions and services---excepting therefrom however, military services and requisitions that may be required of the inlanders and of the nationals of the most favored nation."⁸

From what we have seen no unilateral regulation has been effected through treaties, and we find no international arrangement on the basis of which it might be said that the contracting parties consider such a rule as appertaining to the accepted law of nations.

Yet is improbable to ascertain from them the legal view points that in a treaty heavier burdens are imposed for the nationals of the respective states, than those which might impose in any event in accordance with the law of nations.

It has been asserted by many writers that war taxes may be laid upon the landed property of neutrals in the territory of one of the belligerent parties, but that the movable property of nationals of neutrals states found within the war zone or within the territory of one of the belligerents may not be touched, so long as they themselves refrain from participating in war like operations. This view cannot be regarded as tenable for war taxes might fall within the category of contributions which, being seriously regulated by the law of war, can only be levied by the occupant in case of military necessity; and

7. Ibid, p.13

8. Ibid, pl4

movable property, such as railway material or rolling stock, that may be requisitioned in case of absolute necessity, has been recognized by the Hague Regulations. In view of the treaties concluded by the contracting powers, we should remember, however, that they hold always if one of the contracting powers is involved in a war in which the other one remains neutral.

2. Treaties regarding the requisition in territorial waters.

We have found that European sovereigns usually claimed a right of impressing vessels, whether domestic or foreign found within their waters for the purpose of transport in time of war. But even outside the ports, and on the open seas, ships were also stopped to be used in the service of the state. The status of this is found in Selden's reports from the Decrees of King Edward the III, in which it is ordered that all ships of ten tons burden and which have already made passage and been found in the southern and western seas, may be stopped and armed in order to serve the King—such was the usage under King Edward III, and also of other English Kings. There is hardly any contractual law that deals with this case. It may be due, to the fact that the open sea has been unanimously recognized by all nations as the common highway where ships are subject to no requisition whatever on the part of the belligerent, except in case of the violation of neutrality. On the other hand, the requisition of neutral ships in territorial waters as claimed by most writers as the right of angary and was originally a royal prerogative. That the right was much abused may be surmised from the character of the prohibitory clauses appearing in some of the seventeenth century treaties that the vessels of the contracting parties shall not be seized. If seizure is absolutely necessary, the consent of the owners must be obtained.

Evidently, before the treaty stipulations, vessels must have been seized for almost any purpose, and the personnel of the vessels were seized and forced to serve within them. It would follow from this that the requirement of the consent of the owners of the vessels is equivalent to denying the right of requisitioning private neutral ships at all. Such treaties continued down to the end of the eighteenth century. The result was that the practice fell into disuse.

As a result of the Napoleonic War, the peace of the right of requisitioning neutral ships in territorial waters in international law was radically changed. The change came about from the precedent established by Napoleon in 1789. In the midst of his wars, he, as the head of the Directorate, issued an order which provided for the requisitioning of ships in the French ports of Vecchia, Nice, Marseilles, and others.

Prior to this event, by the treaty of 1785 between Prussia and the United States, Article 16, it was provided "that the subjects or citizens of each of the contracting parties, their vessels and effects shall not be liable to any ~~embargo~~, or detention on the part of the other for any military expedition or other public or private purposes whatsoever."

With this precedent freshly in mind the negotiators revised the treaty with Prussia in 1799. Therefore the above clause was inserted a provision authorizing the requisition of vessels of the respective countries, but providing that "the proprietors of the vessels which shall have been detained whether for some military expedition, or for what other use soever, shall obtain from the government that shall have employed them, an equitable in-

10. Am. Jour. Int. Law., vol. 13, p. 268 (April, 1919)

11. Pitt Cobbett, Leading Cases on International Law, vol 2, p. 268

p. 1477

12. Minnesota Law Review, p. 417

13. Treaties and Conventions between U.S. and other powers

demnity, as well as for the freight as for the loss occasioned by the delay.¹⁴

It should be noticed, however, that from that time the old form of the right of angary, (that is, that the personnel of the ships were seized and compelled to serve with them) is practically obsolete and scarcely likely to be revived. The exercise of the right is no longer based on royal or official prerogative, but rests on military necessity,¹⁵ and it took less arbitrary and oppressive character.

Treaty stipulations similar to those of the revised treaty between the United States and Prussia in 1799 are to be found to a considerable extent in the nineteenth and twentieth centuries. The parties concerned and the nature of the stipulations will be set forth presently.

In a treaty of 1828 between the United States and Brazil, Article 7 provides that the citizens of the contracting parties shall "not be liable to any embargo nor be detained with their vessels, cargoes or merchandise or effects, for any military expedition nor any public or private purpose whatever, without allowing to those interested a sufficient indemnification."¹⁶

Article 8 of the treaty of 1830 with Venezuela,¹⁷ article 8 of the treaty of 1870 with Salvador,¹⁸ and article 8 of the treaty of 1831 with Mexico,¹⁹ all are to the same effect. It is neither required that the indemnification should have been agreed upon in advance, nor that it should be paid in advance. But article 12 of the treaty of 1870 with Peru, and article 2 of the treaty of 1858 with Bolivia, similarly provide as follows:

14. Malloy, Treaties and Conventions, p.1492

15. Pitt Cobbett, Leading Cases on International Law, Vol.2, p.268

16. Malloy, Treaties and Conventions, p.133

17. Ibid. p.183 18. Ibid. p.1553 19. Ibid. p.1088

"Nor shall they (the citizens of either country) be liable to any embargo, or be detained with their vessels, cargoes, merchandise, goods, effects, without being allowed therefore a full and sufficient indemnification, which shall in all cases be agreed upon and paid in advance."²⁰ Only article 8 of the treaty of 1830 between the United States and Turkey provides:

"Merchant vessels of the two contracting parties shall not be forcibly taken for the shipment of troops, munitions and other objects of war, if the captains or proprietors of the vessels, ²¹ shall be unwilling to freight them."

Germany has also entered into agreements which are, in general, similar to those of the United States, with Salvador, Portugal, Costa Rica, Mexico, the Dominican Republic, Guatemala, Honduras, Colombia, Nicaragua, Spain and Hawaii. The agreements reached in ²² these treaties differ from each other in matters of detail. As regards the matter of indemnification for the requisition of foreign ships for war service in the interest of the state three different regulations have been agreed upon in the various treaties: the indemnification is either to be paid in advance, or it shall merely be determined in advance, or it is merely agreed that indemnification shall be paid.

In former times France concluded certain treaties which were intended to abolish completely, between the contracting parties, the requisition of neutral ships in any form whatever. As a result of the precedent established by Napoleon in 1789, France in more recent years, by treaties which she concluded, has adopted ²³ views similar to those of the United States and the German empire.

20. Ibid., p. 1415 and p. 115

21. Ibid., p. 1318

22. Memorandum of Authorities, pp. 36-39

23. Ibid., p. 48

Italy has also concluded a number of treaties on the subject and follows different systems.

According to the King's Regulations and Admiralty Instructions, 1913, of Great Britain, Article 494 provided:

"If any British merchant ship, the nationality of which is unquestioned, should be coerced into the conveyance of troops or into taking part in other hostile acts, the senior naval officer, should there be no diplomatic or consular authority at the place, is to remonstrate with the local authorities and take such other steps to assure her release or exemptions, as the case may demand, and may be in accordance with these Regulations."

By this, the belligerent is denied the right to seize a neutral ship for such service as would be connected with direct hostilities or represent an assistance contrary to neutrality. But whether this denial on the part of Great Britain is in harmony with the existing international law, there is much doubt. It is certainly of the highest importance when the greatest maritime power expressed itself to that end.

However, it should be noticed that with the exception of the Danish-Prussian Treaty of June 17, 1818, and two Italian treaties with San Domingo and Nicaragua of October 18, 1886, and June 25, 1906, respectively, all the nineteenth and twentieth centuries allow the exercise of the right of requisitioning private neutral ships with full indemnity, and that the seventeenth and eighteenth century treaties excepting the revised treaty of 1799 between the United States and Prussia, relate to the old right.²⁴ But the question comes up as to the status of the right in the absence of treaty stipulations. In this case, is it exercisable at all, and

24. A. J. I. L. April 1919, p.271

if so, is compensation due? Hall believes that "it is possible that a right to compensation might be generally held to exist apart from treaties."²⁵ In the case of U. S. U. Dickelman in 1875, the Supreme Court laid down the rule that:

"Neutral ships and neutral property share the liabilities of the ship and property of citizens of the state, save in so far as they are exempted by treaty or by the rules of international law."²⁶ The U. S. Naval War Code of 1900 provides that under military necessity, neutral vessels found within the limits of belligerent authority may be requisitioned, the amount of the indemnity should be agreed on in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon the matter.²⁷ Dr. Bentwich says: "In the nineteenth century a few treaties with South American states have provided for compensations in case of seizure; between European countries this condition is well understood and has not to be specially stipulated for."²⁸

Whatever it may be, it has been the practice among nations that the right of requisitioning private neutral vessels exists, even in the absence of a treaty recognizing it, but that a treaty renders the position of the affected neutral more secure as regards indemnity or compensation which might be given without the treaty. This has indeed been the case in the three notable exercises of the right, namely, by Napoleon I in 1798, by Prussia in 1870, and by the United States, Great Britain, and other powers during the recent war.

25. Hall, International Law, p.742

26. Minnesota Law Review, Vol.2, p.423

27. International Law Discussion, 1903, p.36

28. Bentwich, War and Private Property, p.39

Chapter IV

The Attitude of Authorities toward the Requisition of Private Neutral Property.

Before attempting to classify the authorities, one important point has to be borne in mind, that those authorities who wrote before 1798 generally were writing of the old right which included the seizure of the personnel of the vessels. Therefore their opinions are not to be placed in the same category as those who wrote later. Yet in the earliest part of the seventeenth century, we find that in the most celebrated work, De Jure Belli ac Pacis of Grotius, the most distinguished writer, stated that seizure of neutral goods by a belligerent could be regarded as proper only if the latter could prove a "right of necessity." In the passage referred to, he said:

"It may appear superfluous for us to treat of those who are extraneous to the war, since it is evident that there are no rights of war against them. But especially when they are neighbors, on the pretext of necessity, we may here briefly repeat what we have already said:-that necessity, in order to give a person a right to another's property, must be the extremest kind-that is further requisite, that there be not a similar necessity, on the part of the owner;- that even when the necessity is plain, more is not to be taken when it requires; it is sufficient, it is not to be destroyed; if destroying it is requisite the price is to be paid."¹ This is the first attempt to base this right on deeper scientific ground, a right which it is intended shall apply to neutral property and especially to neutral ships.

1. Grotius, De Jure Belli ac Pacis, vol. 3, p. 288

Vattel in his law of nations published in 1758 holds like views. He says:

"If a nation has urgent need of vessels, wagons, horses, or even the personal labor of foreigners, it may make use of them, by force if consent² cannot be had, provided the owners are not under a like necessity themselves. But its right to these things is merely that which necessity gives it, it must pay for the use it makes of them if it is able to do so. European practice is in accord with this principle. Foreign vessels which happen to be in port are pressed into service in time of need, but payment is made accordingly.

In the passage from Grotius, it does not appear that he referred to the right of requisition of neutral ships at all, although Vattel in the final sentence of the passage quoted plainly refers to it. Nor did either of them seem to understand the right of angary.

In the literature of the nineteenth and twentieth centuries, we will find that most of the writers regard the requisition of neutral ships as the right of angary, and that the right is recognized only in time of war. There are different opinions regarding this question, and efforts made to restrict more or less the right of requisitioning neutral property with regard to the condition under which it may be exercised.

It has been thought useful to divide the authorities into four classes: 1. Those who admit the right of requisitioning private neutral property, provided indemnity is paid and it is exercised in case of urgent or extreme necessity. Writers in this category are classed as favorable; 2. Those who are less emphatic in admitting the right or who limit or qualify it, being class-

ified as favorable with qualifications.³ Writers who oppose the right, such authorities being classified as unfavorable. 4. Those who merely define it or refer to other opinions, these being classified as non-committal.

According to J. E. Harley's classification, a separate list is made of those who wrote before 1870 and those who came after that date. Before 1870, there were favorable,⁸ favorable with qualifications,¹ unfavorable,² non-committal, none. After 1870, there were favorable,⁴² favorable with qualifications,⁷ unfavorable,³ non-committal,³.

Those classified as favorable with qualifications and non-committal, not only constitute the smallest number but represent the element of indifference which adds little value to the right in question. Therefore, for convenience, the authorities will be divided into two classes. Namely, those who are favorable and those who are unfavorable. For clearness, it will be more important to classify them according to their nationality, and see what will be the difference of attitude in their national characteristics. Thus, I will attempt to classify them into two main heads: the Anglo-American Writers and the Continental Writers.

Anglo-American Writers.

Calvo, the greatest of South American jurists, admits the right of requisitioning private neutral property in case of a foreign war, for defense, or for the safety of the state.⁴

Sir Robert Phillimore, the English jurist, declares himself in favor of recognizing the right of angary in war times only, and to restrict it to cases of the most extreme necessity, without at the same time drawing any distinction between ships of the belligerent state and of neutrals. "But if the reason of the thing and

paramont principle of national independence be duly considered, it can only be excused, and perhaps scarcely then justified, by that clear and overwhelming necessity, which could compel an individual to seize his neighbor's horse or weapon to defend his own life."⁵

Westlake states with regard to the ius angariae:

"It seems still to exist in case of real necessity, and its exercise would be certainly subject to the duty of compensation."⁶

Spaight says that the right of a belligerent to seize or destroy neutral property which is passingly within his territory or that occupied by him is not without international recognition.⁷

Cobbett says that the exercise of the right of angary ought to be founded on great military necessity and that a proper indemnity ought to be paid.⁸

Oppenheim believes that under certain exceptional circumstances the belligerent has the right to appropriate neutral property.⁹

Holland says that railway material, and property of other kinds of neutrals found in territory which becomes the scene of hostilities, is liable to be taken possession of by either belligerent; but compensation must be paid.¹⁰

Phillipson holds that a belligerent has the right to use or destroy private neutral property temporarily situated within his territory or control, for reasons of public necessity provided he is prepared to pay for it a proper indemnity.¹¹

6. Westlake, International Law, Part 2, p.119

7. Spaight, War Rights on Land, p.510

8. Cobbett, Leading Cases and Opinions on International Law, p.261

9. Oppenheim, International Law, p.742

10. Holland, Law and Customs of War on Land, p.9

11. Phillipson, International Law, and the Great War, p.72

Halleck, the great American writer says, by virtue of the ⁴⁰
right of angary, neutral vessels may be appropriated by a belli-
gerent on payment of a reasonable price for compensation. ¹²

Taylor, another American writer, says that a belligerent
has a right to use neutral property, accidentally within the
theatre of war, or even to destroy it when necessary, subject to
¹³ liability for just compensation.

¹⁴

Kent admits it in case of "strong necessity."

Other American authorities, such as C. D. Allin, J. W. Garner,
and J. B. Scott, all admit that the requisition of private neu-
tral property is justifiable provided that compensation is paid
In a word, all these English and American jurists, and some o
thers who have not been mentioned, practically recognize that
due compensation should be made for the use or destruction of the
vessels.

Notwithstanding the precedents, it must be admitted that
there are many jurists, including several English and American
writers of recent date, who either deny the legality of the
right or, as is usually the case, while admitting its validity
severely condemn its exercise and demand its abolition.

For example, Dana, an American writer acknowledged that
angary is recognized both by treaty and in practice, but de-
clares "It is not a right at all, but an act resorted to from ne-
cessity, for which apology and compensation must be made, at the
¹⁵ peril of war."

The outstanding English opponent of the right is T. J. Law-
rence, who is uncompromising against its exercise. "Belligerents

12. Halleck's International Law, vol.1, p.520

13. Taylor, International Public Law, p.720

14. A.J.I.L., vol.3, p.277

15. Wheaton, International Law, p.409

must make war with their own resources and what they can capture from the enemy, not with neutral property which is unfortunate enough to be for the moment in their power."¹⁶

The Resolution of the Institute of International Law adopted in 1898, has also pronounced most strongly in favor of its abolition.¹⁷

The British Regulations and Admiralty Instructions furnish perhaps the most striking agreement in support of this view. Article 446 provides: "In the case of any British merchant ship, whose nationality is unquestioned, being coerced into conveyance of troops or into taking part in other hostile acts, the senior naval officer, should there be no diplomatic or consular authority on the port, will remonstrate with the local authorities, and take such other steps to rescue her release or exemption as the case may demand and may be in accordance with the Regulations."

But this provision, it would seem is directed primarily against the older and now discredited form of angary, rather than against the present mode of exercising the right.

2. Continental Writers.

The view that due indemnification is made for the use or destruction of the vessels (or other neutral property) is also entertained by most of the continental writers. For example;

Dr. Abrecht, a great German jurist is one of the strongest supporters of the right, holding that it exists, not only when the existence of the state depends upon its exercise, but even in case of customary military necessity. He believes that neutral vessels in the waters of a belligerent are subject to extraordinary measures adopted by the belligerent.¹⁸

16. Lawrence Principles of Int. Law, p. 628

17. J.B. Scott, Resolution of Institute of Int. Law, p. 154

18. A.J.I.L., vol. 13, p. 276

Another German writer, named Heffter, also states that it is admissible only as a measure in time of the most urgent necessity
 19 and only provided full compensation is made. Still another German writer allows the exercise of the right in case of military
 20 necessity, provided ample indemnity is paid.

De Cussy, a French writer, believes that the right is exercisable in case of necessity, and that it is a prerogative of sovereignty. Den Beer Boortgael, the distinguished Dutch writes, in his work entitled International Maritime Law published in 1888, says:

"The right of seizure is that right which, according to many, a belligerent state has, in case of extreme necessity, for self preservation, to seize for its own use, the property, that is to say, the ships of neutrals. Full compensation for the value of property and complete indemnification for the persons injuriously
 21 affected by the act, are required.

Some of the continental writers take too extreme a position in favor of the belligerent. For example, Despaginet says that a belligerent can make use of neutral vessels
 22 without indemnity.

Azuni, an Italian writer, boldly asserted that a neutral vessel which attempted to escape from requisition would be liable to
 23 confiscation.

Prerels, who is perhaps the leading German authority on Seerecht is apparently ready to admit the legality of the right of
 24 angary, even in its older and more arbitrary form.

19. Memorandum of Authorities on Law of Angary, p. 35
 20. Ibid, p. 72

21. Am. Jour. Int. Law. vol. 12, p. 353

22. A.J.I.L. vol. 13, p. 277 (April 1919)

23. Taylor, Treaties on International Law, p. 701

24. Minnesota Law Review vol. 2, p. 419

There are also numerous protests against the right of angary, but the opponents of the legality of the measure are only in a minority. From what we have seen, a good majority of both the Anglo-American and the Continental writers admit that the right may be exercised, if indemnity or compensation is paid. And according to the figure given by Harley, of 79 authorities, with the exception of eight writers who are classed as favorable with qualification, and three classed as non-committal, there are fifty writers who are classed as favorable, while only sixteen are classed as unfavorable. If then the facts here shown are connected with those indicated in the classification of treaties, that only three of the treaties examined for the nineteenth and twentieth centuries forbid the exercise of the right if indemnity is paid, it ought to be said that far from being scarcely defended, it is defended by most authorities, by treaties, (excepting treaties made for requisition on land) and was extended by the Hague Conventions of 1899 and 1907 to apply to railway materials. Therefore the conclusion may safely be made that so far as these sources contribute to the making of international law, the right exists and is exercisable.

There are two points, however, that should be borne in mind. First, the views of the Continental writers on the legitimacy of angary have been greatly influenced, as Professor Oppenheim points out, by their attitude toward the doctrine of conditional contraband.²⁵ In as much as they deny the validity of the Anglo-American doctrine of conditional contraband, they have been forced to set up another principle in its place to justify the right of the belligerent to preempt all goods which are bound for a hostile state. That principle they have found in the right of angary. But preemption, as seen above, can only be exercised on the open sea in case of

25. Oppenheim, International Law, Vol. p.444

carrying conditional contraband of war. And on the open sea, a neutral vessel is subject to no other jurisdiction than that of the country whose flag it flies. Therefore it may be admitted that pre-emption, as claimed by the Continental writers, can never be included within the sphere of the right of angary, because the latter, as understood, only consists of the right of requisitioning private neutral property within territorial jurisdiction.

Secondly, a number of international jurists, particularly those of the continent, base the right of angary too much upon the doctrine of military necessity. Von Liszt, for example, looks upon it as a form of Kriegsraison. To him, it is of force rather than of a principle of law. But this conception savors altogether too much of Prussian. Militarism to commend it to the great majority of students of international law. To this interpretation of the right is doubtless due in fact, much of the suspicion as to the legitimacy of its existence. The true basis of the right, according to most Anglo-American jurists, is to be found in the principle of territorial sovereignty. The law of every state is supreme over both persons and property within the local jurisdiction. In the case of U.S. v. Dickelman, the supreme Court laid down emphatically "that ships which voluntarily enter a foreign port thereby place themselves under the laws of that port. This is no doubt based on the principle of territorial sovereignty.

26. Hall, International Law, p. 749

27. Minnesota Law Review vol. 2 p. 423

Chapter V

Application of the Right of Requisitioning
Private Neutral Property

Formerly European sovereigns asserted in time of war a special prerogative, whereby foreign vessels found within their territorial waters were not only liable to be impressed for purposes of transport, but the personnel of the vessels were also forced to work with them. The right was, no doubt, much abused. As a result, we find treaties regulating such practice as late as the eighteenth century. And some writers considered the right of angary as obsolete as far as its usage was concerned. It was not until the close of the eighteenth century when Napoleon again called the practice into play.¹ This case witnessed a revival of the right. And with the development of human methods of warfare and a more general recognition of the rights of neutrals in the nineteenth century, the right of angary was much ameliorated and became less oppressive.

One of the cases which furnishes confirmatory evidence of the rise of neutral vessels by Napoleon is the case of Carolina, decided in the British High Court of Admiralty, April 30, 1802. This was a Swedish vessel which had been used by Napoleon to transport troops to Egypt. The owner of the vessel brought his claim for damages against the British Government, but Sir William Scott decided that he must resort to the French Government for claim.² Evidently the British authority recognized the fact that within territorial jurisdiction a belligerent has a right to dispose of any neutral vessel or property.

1. Taylor, A Treatise on International Law, p. 767
2. A. J. I. L. Vol. 13, p. 286

There are a few important facts, however, that should be noticed in regard to the kinds of neutral property that may be requisitioned, and the forms of the right of angary. As to the kinds of property, the text writers on the subject may be divided into two categories: (1) those who confine the doctrine of angary to ships and vehicles; and (2) those who extend it to neutral property generally. According to my view, the right, if exercisable at all under certain circumstances, must be applied to all neutral property generally, if it is serviceable for war operations. Professor Oppenheim says that all sorts of neutral property, whether it consists of vessels, or other means of transport, or arms, ammunitions, provisions or other personal property, may be the object of the right of angary, provided that the articles conceived are serviceable to military ends and wants.³

As to the right of angary, suffice it to say that it may be extended not only to appropriation, but to destruction and detention of private neutral property. The facts in question will be revealed in the following cases:

With regard to the appropriation of railway material, we may recall that in 1870 the Germans seized in France more than 600 railway carriages belonging to the Central Swiss Railway Company, as well as a large quantity of Austrian rolling stock, and utilized them in their military operations.⁴ This form of the right of angary is now specially recognized by Article 19 of the 5th Convention of 1907, which says: "Railway material coming from the territory of neutral powers, whether it be the property of the said powers or of companies or of private persons, and recognizable as

3. Oppenheim, International Law, Vol.2, p.395

4. Westlake, International Law, Vol.2, p.118

such, shall not be requisitioned or utilized by a belligerent except in so far as is absolutely necessary. It shall be sent back as soon as possible to the country of origin."

For the particular form of the right of angary, namely the destruction of neutral vessels situated temporarily in belligerent territory, there is a noteworthy precedent in the Franco-German War. At the end of 1870, the Germans seized six British coaling vessels lying in the River Seine, near Duclair, and sank them, because the German commander at Rouen wanted to block the passage of the river so that French gunboats might be prevented from approaching. In answer to the British representations made on behalf of the owners and crews, Bismark expressed the regret of his government, and declared that if acts had been done beyond what was necessary, the guilty persons would be called to account. At the same time he contended that the proceeding was in conformity with the existing right of angary. The British reply admitted the tenability of the contention, and merely requested the payment of indemnity, which was afterwards satisfactorily arranged.⁵

The right in question also extends to the detention of neutral ships found within belligerent jurisdiction, where this is required for military reasons. So during the American civil war, the Labuan, a British vessel, was detained by the United States authorities in order to prevent the divulgence of important information with respect to a military expedition then about to be dispatched, an indemnity for the detention being subsequently paid.⁶

As stated before, neutral property domiciled in another country acquires the character of the subjects of that country, and a

5. Ibid., p.118

6. Cobbett, Leading Cases on International Law, Vol.3, p.341

belligerent, in applying the right of eminent domain, may, in case of urgent necessity, requisition any neutral property. But there are exceptions to this rule. For example, the experience of the Transvaal annexation seems to show that special favor may be extended to neutral corporations, as regards the contractual rights of semi-public character.⁷ By the old law a neutral corporation which carried on its operations in the enemy country would have been held by domicile to be an alien enemy. But the economic features of the world have changed since then, and have made it desirable to pay regard to the real rather than nominal character of companies in wartime. The latest practice points to a change in this direction, but some definite pronouncement upon the position of enemy and neutral corporations in war is much to be desired. The English practice, however, so far as it goes, is instructive. The English commissioners also showed a disinclination to press against neutral shareholders. But they declared that a company may acquire technical enemy character by being incorporated and registered and by carrying on its operations in the conquered country. This seems, to me, quite reasonable.

By far the most important use yet made of the right of angary or the right of requisitioning neutral property generally, occurred in the recent war. In August, 1914, the British Government took over four large men of war lying, in course of construction, in her dockyards, and destined for the neutral states of Chili and Turkey. (Turkey then being neutral). The Porte protested against this action as being contrary to international law. But it is a universally recognized practice and therefore it is in accordance with the law of nations. The British Government replied that consideration of

7. Buntwich, War and Private Property, pp. 74-75

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public interests necessitated the appropriation, and that full compensation would be paid.⁸

The case of the Zamora arising out of the present war and involving the question of the right to requisition neutral vessels, was decided in the British Admiralty Court in 1916, by the Judicial Committee of the Privy Council. Concerning the legal aspects of the case, Lord Parker in rendering the judgment said, "that, at any rate in time of war, some right on the part of a belligerent power to requisition the goods of neutral within its jurisdiction will be found to be recognized by international usage might be expected either to sanction the right of each country to apply in this respect its own municipal law, or to recognize a similar right of international obligation."⁹

By far the most important case in the exercise of the right of angary is that of the requisition of about 1,000,000 tons of Dutch shipping by the Allied and Associated Governments, particularly the United States and Great Britain, within their respective ports in March, 1918.

The "imperative military needs of the United States," stated the President in his proclamation, "requires the immediate utilization of such vessels," and he added that "full compensation" could be made to the owners "in accordance with the principles of international law" and that "suitable provision will be made to meet the possibility of ships being lost through enemy action."

On March 25, the American Legation at The Hague made public the following statement: "That the United States has not taken title to any such ships under the present proclamation, but has merely taken them over for temporary use.

8. Phillipson, International and The Great War, p. 72

9. Trehern, British and Colonial Prize Cases, Vol. 2, Part 6,
pp. 1-32

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"Liberal chartering rates will be paid and the ships returned at the termination of the present emergency, and not later than the end of the war.

"The United States will assume all marine risks and the owners will be given the options of receiving the payment of the value of the vessel or having the vessel replaced as soon as possible after the termination of the war, meanwhile receiving interest on the value of the lost vessel."

On the other hand, Mr. Balfour defended the British seizures on the ground of the ancient right of angary, which he said was not obsolete, and of the general right of sovereignty over all persons and property within British jurisdiction; and he gave similar assurances to those of President Wilson in regard to compensation and restoration of the vessels.¹⁰

The action of the United States government in this instance is more justifiable than that of the British government, because of the peculiar circumstances of the case. The United States naval Regulations, as we have seen, distinctly recognize the legality of angary. The Dutch ships accordingly entered the United States ports at their own risk, and they knew, or ought to have known, that they were subject to requisition at any time. On the other hand, the British exercise of the right seems to be ambiguous, because the British government has two laws conflicting with each other, regarding this particular right, namely, (1) the Civil Law, or what Mr. Balfour called the ancient right of angary, which affirms that seizures of neutral ships found in the British ports, are entirely within the sovereign rights of British Empire, and (2) the King's Regulations

10. Garner, International Law and The World War, Vol.2, pp.175-176; A. J. I. L. Vol.12, pp.335-356

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and Admiralty Instructions (as seen above) which deny the legality of the right.

However, the latter provision may be defended by stating that it is directed primarily against the older form of angary, rather than against the present mode of exercising the right. Moreover, the regulations do not venture to deny the legality of the practice. They simply provide an effective means for securing the release of British vessels which may have been requisitioned for naval purposes without just cause.

In this study, we are only concerned with the right of requisitioning private neutral property exercised by the belligerent government in time of war. But it is worth while in this connection to raise a question not within the field of this thesis, namely as to whether a neutral government may exercise a similar right in respect to the property of a belligerent enemy. The neutral government has no reason of military necessity to assign for its action, unless of course, indirect hardships caused by the belligerent's action may be called a military necessity as regards the neutral. But a neutral country certainly can strengthen the idea that the right of angary must henceforth be regarded as a right of territorial or jurisdictional sovereignty, or the right of eminent domain. This question was raised during the recent war by the action of the governments of Italy, Portugal, and Spain in requisitioning German merchant vessels lying in their ports, while those countries were still officially at peace with Germany, although in the case of Italy, diplomatic relations had been broken off.

The Italian decree, promulgated November 11, 1915, applied particularly to the requisition of German vessels then lying in Italian ports. The provision embodied in the decree for monthly payments to the affected owners of the requisitioned vessel is

new. Such a provision is not found in any of the treaties, nor did the United States or Great Britain allow monthly payments to the Dutch shipowners.¹¹

On February 27, 1916, the government of Portugal requisitioned all German vessels found in Portuguese territorial waters on the ground that it had done nothing more than to exercise the right of eminent domain in respect to the property seized, and this was an admitted inherent and sovereign right of all states. Moreover, the Portuguese government relied on article 2 of a treaty of commerce and navigation concluded between the interested parties on November 30, 1908, which declared "that ships as well as all other merchandise or property belonging to either party, found in the territory of the other, might be requisitioned for public use upon compensation previously agreed upon between the parties concerned," and she declared that she would pay compensation at the end of the war. The only question, therefore, that could be raised was whether Portugal had exercised the right thus recognized in accordance with the procedure set forth in the treaty.¹²

On August 31, 1918, the Spanish Government took over all German vessels lying in Spanish ports. About 90 vessels were affected. The action of the Spanish Government furnishes a clear cut example of a neutral seizing vessels of a belligerent, and unlike Portugal, Spain remained neutral throughout the war. The Spanish note makes clear that neutrality was to be maintained, that no change of title, but only temporary use, was contemplated, and that the seizure was "indispensable to its existence." Nothing is said of indemnity, but

11. A. J. I. L. Vol. 13, p.294

12. Garner, International Law and The World War, Vol. 2, p. 176

it appears from the note that the Spanish Government regarded the requisitioned vessels merely as substitutes for its own vessels sunk by Germany and therefore that no indemnity was to be paid.¹³

The right to requisition belligerent property, as exercised by these neutral countries, is, indeed, recognized in the latter part of the article 19 of the Hague Convention of 1907, which provides that a neutral power may likewise, in case of necessity, retain and utilize to an equal extent property coming from the territory of belligerent state, compensation to be paid by either party in proportion to the material used and to the period of usage. This provision undoubtedly contains an implied recognition of the right of eminent domain upon which the action of all the neutral countries is based. It is a sound and just principle that if such a right be conceded to belligerents, it should be equally conceded to neutrals whose need for merchant ships during a world war may be as urgent and imperative for the maintainance of their economic life as the military necessities of belligerents. The conclusion, therefore, must be that these neutral countries were within their legal rights in requisitioning the German ships lying in their ports, although in the case of Portugal, there is ground for difference of opinion as to whether her procedure was strictly in accord with her treaty with Germany; and in the case of Spain, without stating that indemnity would be paid, is contrary to the law of nations. True, Germany had sunk many of her vessels during the war without just cause, but that was the very practice that brought her to a great defeat. On the part of Spain, the denial of payment is akin to resort to reprisal, a deed which an honest nation would refuse to do.

Chapter VI

Results of the Present Study with Reference to International Law

So far as the right of requisitioning private neutral property is concerned, we have dealt with different phases. And we have noticed that most of the treaties concluded on the subject and most of the jurists are in favor of the right. As regards present international law, there is a great deal of uncertainty and inadequacy on this question. No provision of the Hague Conventions deals directly with the question of angary in relation to ships, but there is in case of war on land one article, namely, article 19 of the 5th Convention of 1907, which explicitly provides that the requisition of railway material is allowed. But there is no reason why railway material alone should be requisitioned. Why should not ships or other means of transportation or things that are useful for military necessity also be appropriated? This shows the inadequacy of the Hague Convention. In fact, if the right of eminent domain is the sacred right of any belligerent, there is no material difference in principle between the rules which should govern the requisition of the instruments of commerce on land and in port.

So far, we have dealt with the question of the requisition of private neutral property which bears no hostile character. But what is the status of neutral property which is engaged in unneutral service in the territory of a belligerent itself or within the territory which is occupied? On this point, the Declaration of London provides that:

"A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were

1. If she take a direct part in the hostilities;
2. If she is under the orders or control of an agent placed on board by the enemy government;
3. If she is in the exclusive employment of the enemy government;
4. If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation.¹

Evidently, it makes no difference whether the ship voluntarily or compulsorily renders the state services, for it is only asked that the ship does, in fact, render that kind of services. If it is innocently forced by the belligerent to perform the services, its capture is not justifiable, because in case of unneutral service, the property is, as a rule, confiscated rather than requisitioned. But in time of war, it is very difficult to distinguish between a voluntary or compulsory undertaking. If the latter case is exempted from capture, then the belligerent would be tempted to requisition the neutral property rather than that of her own subjects. With reference to this point we have found that the British Regulation and Admiralty Instructions distinctly deny the right to seize a neutral ship for such services as would be connected with direct hostilities or represent an assistance contrary to neutrality. Even the seizure of English ships for the transportation of goods representing contraband of war would lead to the interference of the ship's commander; for transportation of contraband is also regarded by the

1. Bentwich, Declaration of London, p.89

English as participation in hostilities. If that is the case, no neutral would be willing, unless a decided advantage could be gained (which is by no means certain in time of war), to be engaged in any unneutral service for a belligerent who, under urgent necessity, is liable to requisition any neutral property which happens to be within his territorial jurisdiction. The property so requisitioned must be directly or indirectly needed for the purposes of war operation. If transportation of troops is considered as participation in hostilities at all, the belligerent would never have any chance to requisition any neutral property even within his territorial jurisdiction. This of course can hardly be universally accepted as a part of international law. The case of the sinking of several English vessels by the Prussians, during the Franco-Prussian war of 1870-1871, cannot be considered as a case of using neutral property for the purpose of engaging in acts of hostility. Even the English government accepted the decision that compensation would be made for the loss. If destruction of neutral property is recognized, there is no reason why appropriation of it should not be recognized also, if adequate compensation be paid in either case.

As regards the requisition of neutral ships both in territorial waters of a belligerent and in ports of the occupied territory, there is no difference in principle, if in the latter case the authority of the enemy has been completely suspended and his own lawfully substituted by the occupant; though it must be remembered that in either case, the owners should be fully compensated. That it is not a duty of a belligerent to pay indemnity in appropriating or destroying private neutral property to the owners, as contended by Count Bismarck in the case of sinking the English vessels during the Franco-Prussian War in 1870 (although he agreed to pay indemnity) can

According to the law of war, neutral property permanently located in the territory of the belligerent is subject to the same treatment as the property of the nationals of the belligerent, as far as requisitions are concerned. On the other hand, neutral property which has had a continued sojourn in the occupied territory, is treated in the same manner by the occupying power as the nationals of the occupied territory for the reason that such property, being internally bound up with the national economy of the enemy, necessarily contributes to strengthen its auxiliary resources. Article 53 of the Hague Conventions stipulates the payment of indemnities for the seizure and utilization of all appliances adapted for the transport of persons or goods which are the private property of inhabitants of the occupied enemy territory,² and article 52 of the Hague Regulations stipulates payment for requisitions.³ If the immunity from confiscation of private enemy property is thus recognized, the position of private neutral property ought not to be less favorable. But according to the practices of nations in land warfare, compensation made for the requisition of private enemy property depends upon the grace of the belligerent. Therefore, private neutral property, through its continued sojourn, is necessarily subject to the same treatment, though in either case, a civilized nation would not refuse to pay suitable compensation. On the other hand, neutral property which by mere chance is found temporarily within the territory of one of the belligerents, shall be requisitioned only under very special circumstances, in case of a very critical situation, and in such case, the respective belligerent is

2. J. B. Scott, The Hague Conventions of 1899 and 1907, p.125
3. Ibid., p125

Another point, though not within the sphere of the present study, is worthy of notice in this connection. That is, when speaking of the requisition of belligerent vessels by a neutral country, as expressly recognized by the 19th article of the Hague Regulations, we mean to apply only to those vessels in transition, and not to those which had taken asylum in neutral ports to avoid capture. During the recent war, the Portuguese Government, in requisitioning the German vessels, contended that the rules of procedure regarding requisition of ships laid down in the treaty of 1908 between her and Germany, applied only to those in transition. But various German newspapers regarded this circumstance as a special reason why the German ships should not have been seized. They were, it was agreed, in Portuguese ports as refugees against capture by the enemy, and it was therefore a violation of the right of asylum to requisition them.⁴ But the right of asylum, according to international law, means the right of the belligerent to shelter only under such circumstances as when their vessels are driven to a neutral port by stress of weather, or by being otherwise reduced to an unseaworthy condition, and this right cannot be refused by a neutral without a breach of international law. But this is entirely different from the fact that they take asylum in neutral ports to avoid capture.⁵

In exercising the right of requisitioning private neutral property for the transportation of troops or for other war purposes, some writers, especially those who are in favor of its abolition, contend that the neutral, in consenting to the exercise of the right,

4. Garner, International Law and The World War, Vol.2, p.179
5. Lawrence, International Law, p.624

commits a violation of neutrality. Thus the British Regulation and Admiralty Instructions deny the right to seize a neutral ship for any services as would represent an assistance contrary to neutrality. To this contention, General den Beer answers that:

"Whenever a belligerent, compelled by necessity, seizes upon that which he finds ready to hand, takes possession of it and disposes of it as he sees fit and assumes full liability for all damages, then the offence against neutrality disappears, because it is no longer the neutral but the belligerent who performs the service."⁶

This is, no doubt, a very strong and wise argument for the defense of neutrality. It may indeed be admitted also that the requisition of neutral vessels lying within the territorial waters of a belligerent state is an extreme right and not one to be lightly resorted to. At the same time, if the right exists, it is of course for the belligerent to determine when it shall exercise the right.

As to the question of treaty stipulations, we have found in the case of requisitioning private neutral property in the territory of a belligerent state, treaties in which contracting states renounce the recourse to requisitions against neutrals of the other contracting party residing within their territory; treaties according to which requisitions are admissible only in case they appear as taxes connected with the possession of landed property; finally treaties in which it is agreed that the nationals of the other contracting party are subject to the same taxes as the nationals. But there is no unilateral regulation which has been affected through treaties. It should also be noticed that no treaty stipulation has

been found in regard to the requisition of the same in occupied enemy territory. As regards the requisition of neutral vessels in territorial waters, all conventional provisions to which we have referred seem not only applicable to the case when a government requisitions neutral ships within its own ports, but also to the case when such act takes place within occupied enemy waters. A restriction to the former case is not expressly stated in any treaty. From the legal viewpoints of the states that have concluded treaties regarding the requisition on land, it is very improbable that in a treaty heavier burdens are imposed for the national of the respective states than those which they might impose in any event in accordance with the law of nations. All the conventional agreements to which reference has been made show clearly the effort to protect the property of the respective nationals to improve its legal status.

On the other hand, according to the juridical view of the contracting parties with respect to the requisition of ships in territorial waters, by means of the treaties the ships enjoy greater privileges and are given a more favorable legal status, than they would have according to the accepted law of nations. It is evident, therefore, that it is more advantageous to have a treaty stipulation for the purpose because of the fact that in case of controversy, an express stipulation would mean a great deal in securing the right. However, it should be noticed that a belligerent, under urgent necessity, is not deterred from requisitioning neutral property which happens to be within territorial jurisdiction, even without treaty stipulation. As Pitt said: "the very circumstance of making an exception by treaty proves what the law of nations would be if no such treaty were made to modify or alter it."⁷

As far as treaty stipulations are concerned, we have noticed that most of them are in favor of the right of requisitioning private neutral property. Yet, considering the 48 powers in the world, there would be a possibility of 1128 treaties on any given subject provided that each power made a treaty with every other power. As a matter of fact, only about 42 treaties regarding the requisition of ships have been made, and practically all of them have been made with south and central American countries. But it makes a tremendous amount of difference if the 42 treaty exceptions are made by countries of small weight in international affairs or by some of the great powers.

As to the status of compensation, distinction must be made between the requisition of private neutral property which is permanently situated in the belligerent state and that which is accidentally within territorial jurisdiction. In the former case, compensation, as has been discussed, depends upon the grace of the belligerent, because the property, through its continued sojourn, and under some circumstances, acquires the same character as the nationals of that state. In the latter case, according to the older view, the belligerent was seemingly under an obligation to compensate the neutral for loss of freight only.⁸ But it is safe to say that this restricted view of the liability of a belligerent would not be entertained today. In all cases full compensation should be made, not only for the use of the vessel but also for the loss of profits and for the damage and destruction of any of the ships during the voyages. Whenever possible an agreement for indemnity should be arranged in advance. There are, however, three different regulations which have been agreed upon in the various treaties: the indemnific-

8. Minnesota Law Review, Vol. 2, p. 424

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ation is either to be paid in advance, or it shall merely be determined in advance, or it is merely agreed that an indemnification shall be paid. The obligation is recognized not only in numerous treaties, but is confirmed in spirit, if not by the letter of the law, by article 53 of the Hague Convention, providing for compensation for the use of requisitional means of communication in occupied territory. And according to the U. S. Naval War Code of 1900, "neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military purposes, if military necessity should require it, but in such cases the owner of neutral vessels must be fully recompensed. The amount should be agreed on in advance with the owner or master of the vessel."

As to the amount of compensation which will be given, no treaty has ever furnished any right. Indeed, the fixing of the amount would be a considerable task and many factors must enter in. The suggestion of Bismark in 1871, that if Prussia and Great Britain could not agree on a fair amount, it should be submitted to an arbitrator, is sound. And in view of the recent war, it would seem to be well, for the sake of the sanctity of treaties, that treaty clauses providing that indemnity be fixed in advance might give way to clauses allowing indemnity to be fixed by a disinterested commission of experts or by arbitrators. This should, however, be done after the emergency is passed.⁹

In conclusion, we may state the general principle that the right of requisitioning private neutral property or the right of angary in general, based on the right of eminent domain, is divisible into two main categories; first, as regards the use or des-

truction of neutral property which has continued sojourn in belligerent territory; and, secondly, as regards the use or destruction of the same which is merely passingly within territorial limits, as some writers consider that as the right of angary. In the former case, compensation depends upon the grace of the belligerent state, while in the latter, compensation is obligatory. But in either case, there must be urgent necessity, and the right is exercised only in time of war, though some writers admit that it can be exercised both in time of war and peace. Unfortunately, the term "military necessity" is rather ambiguous. It is often relied upon too much by the belligerent, and especially is it most strongly advocated by some of the German writers. Military necessity may mean that which is absolutely necessary for the operation of war, or it may mean that which has only economic value in the conduct of war. It is of course up to the belligerent to decide the right of requisition itself. But it does not infrequently happen that concession is made to neutral interests on the ground of public policy and convenience. But this limitation is essentially self-imposed.

As regards the present status of international law, there is a good deal to be said with reference to the possibilities of its development and amelioration. We have noticed that in land warfare, while it has hitherto been the custom to lay hands on all the transport within reach without drawing nice distinctions as to its ownership, the practice is now surrounded with the closest restrictions. There is therefore little to be said for it in maritime struggles where the difference between neutral and belligerent property has always been sharply accentuated. But we can hardly deny that the position of the neutral ship is always precarious and unpleasant, and the reason therefor is to be found in the entire

system of the rules of maritime warfare which in some cases even recognizes the possibility of confiscation of private ships being determined by reasons of expediency and politics, and not by mere fairness, and in which the rights of private individuals are given less consideration than they receive in the rules of warfare on land. Therefore, if any improvement is made in regard to the requisition of private neutral property, the prize law should necessarily respect neutral property as much as in the warfare on land. By far the most important of all is that a definite body of rules regarding the exercise of the right should be drawn and enforced effectively by an International Tribunal as contemplated in the League of Nations.

Indeed the right in question is from its very nature a dangerous measure. It should be exercised with the greatest caution, and only under the pressure of national emergency. Phillimore says, "It can only be excused and perhaps scarcely then justified by that clear and overwhelming necessity which would compel an individual to seize his neighbor's horse or weapon to defend his own life."¹⁰ Lawrence says: "We may imagine how fiercely it might be resented, if we contemplate for a moment what would be the consequences of, say, the seizure by the United States Government of all the liners in the port of New York in order to carry to its destination an expedition against a central American Republic hastily planned in a sudden emergency. Half the civilized world would suffer, and the other half would make common cause with it."¹¹ In fact, the right most vitally affects the political and commercial interests of neutrals. It cuts the captain and crews from the vessel; it dispossesses the neutral his property; it interrupts the regular course of business;

10. Phillimore, International Law, Vol.3, pp.50-51

11. Lawrence, Principles of International Law, p.627

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and diverts the ordinary channels of commerce, and what is more serious from a national standpoint is the fact that, it changes the flag of the vessel, and forcibly withdraws it from the protection and control of its own government. To assert this right is certainly a legitimate though extreme exercise of the war power, if based on the right of eminent domain, but its enforcement is almost certain to occasion a feeling of resentment and humiliation on the part of the weaker nations. There is all the greater reason on this account that the right should be exercised with all due consideration to the national pride and financial interests of neutral states.

The End

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